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Case No. 85-1737

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

1986 TERM

KEVIN J. LOVE,
PETITIONER,
vs.
SUMMIT COUNTY, a government entity,
RON R. ROBINSON,
Sheriff of Summit County,
RALPH WILLIAM WALLIN, JR.,
Summit County Commissioner,
GERALD E. YOUNG,
Summit County Commissioner, and
CARL T. OVARD,
Summit County Commissioner,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a pre-trial detainee who is represented by counsel in connection with pending criminal charges and by a second civil rights attorney who provides the detainee with prepared pro se civil rights complaint forms and verbal instructions have an independent right of access to a law library as a means to secure access to the courts?

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DECISIONS BELOW

Petitioner Love brought this 42 U.S.C. § 1983 action in Utah's Federal District Court, Central Division, alleging a violation of his constitutional right of access to the courts.

The District Court, in an unreported decision, granted Respondents' Motion to Dismiss Petitioner's Complaint for failure to state a claim. The Tenth Circuit Court of Appeals held that Petitioner was not deprived of his constitutional right of access in Love v. Summit County, et al., 776 F.2d 908 (10th Cir. 1985).

STATEMENT OF THE CASE

The Summit County Jail is a small facility having a maximum capacity of 26 inmates. During 1981 and 1982, however, it held an average of only eight inmates. I R. 69. The jail does not have a law library. The County has a small law library on the same floor as the jail, but has no rules permitting jail inmates library access. The jail does allow inmates access to telephones, directories, notaries public, and where

the inmate is indigent, the County will appoint counsel for criminal defense matters, and provide free envelopes, stationery and postage to enable the indigent to communicate with the courts.

In January 1982, Petitioner was charged with criminal behavior and incarcerated in the Summit County Jail. I R. 48. An attorney was appointed to represent him. On March 1, 1982, Petitioner no longer required a court appointed attorney and, on March 4, 1982, retained a private attorney. On August 12, 1984, plaintiff pleaded guilty to charges of burglary and theft and was thereafter transferred to the Utah State Prison. I R. 56.

While incarcerated at the Summit County Jail, Petitioner complained that the conditions of his confinement violated the Constitution. His request to use the County Library was denied.

Petitioner asked his criminal attorney to represent him in a civil rights claim against the County. The criminal attorney refused but referred the Petitioner to a civil rights attorney, Brian Barnard, Petitioner's counsel in the instant case. Barnard declined to challenge Summit County's jail conditions, but gave assistance to the Petitioner in order to challenge the conditions of the jail pro se. Barnard provided Petitioner with prepared pro se civil rights forms obtained from the Federal Court Clerk's office, and provided Petitioner with instructions concerning the completion of the forms. Barnard also informed Petitioner that other attorneys might be willing to represent Petitioner in a civil rights action against Summit County and that Barnard would be willing to assist Petitioner in locating such an attorney. Petitioner did not ask

Barnard for assistance in locating another attorney and did not file pro se pleadings challenging the conditions of the Jail.

SUMMARY OF ARGUMENT

An inmate's constitutional right of access to the courts is realized where the inmate is afforded the opportunity to file meaningful legal papers with a court and where his ability to prepare the petition or complaint is protected. Access to law libraries is not mandated by the Constitution. Petitioner was accorded meaningful access to the courts through his consultations with his civil rights attorney.

ARGUMENT

It is well established that "prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821 (1977). The Supreme

Court recognized that right in Ex Parte Hull, 312 U.S. 546 (1941), when it struck down a prison regulation prohibiting state prisoners from filing habeas corpus petitions until they were screened by a parole board. Similar prison regulations were invalidated in Johnson v. Avery, 393 U.S. 483 (1969) (prison rule prohibiting prisoners from assisting one another in preparing habeas corpus petitions was unconstitutional); and Procunier v. Martinez, 416 U.S. 396 (1974) (prison rule prohibiting prisoners' use of paralegals and law students was unconstitutional). In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court specifically extended right of access concepts to the Civil Rights Act of 1871. Today, access rights place upon the state affirmative obligations to insure meaningful access to the courts:

> Our decisions have constantly required states to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.

Bounds v. Smith, 430 U.S. at 824-25.

Reduced to its essential elements, right of access to the courts requires that inmates be afforded a legitimate opportunity to file "meaningful legal papers," Bounds v. Smith, 430 U.S. at 828, with the judiciary concerning "violations of fundamental constitutional rights." Wolff v. McDonnell, 418 U.S. 539, 579 (1974). The constitutional inquiry is whether "the ability of an inmate to prepare a petition or complaint" has been protected. Bounds v. Smith, 430 U.S. at 828, fn. 17. Where prisoners are given a "reasonably

adequate opportunity to present claimed violations of fundamental constitutional rights to the courts", the state regulation or prohibition passes constitutional muster. Id. at 825.

The due process right of access does not mandate right of entry into a law library. The prison library is "but one factor in the totality of all factors bearing on the inmate's access to the courts which should be considered." Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978). The Supreme Court has "made it clear that prisoners have no absolute right to any particular type of legal assistance." Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978). Thus, while "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that

goal." Bounds v. Smith, 430 U.S. at 830-31. The Constitution simply does not require "that every small jail must have a law library . . ." Williams v. Leeke, 584 F.2d at 1340.

Fundamental access rights are fulfilled where inmates have a "reasonable opportunity to seek and receive the assistance of attorneys," Procunier v. Martinez, 416 U.S. 396, 419 (1974), whether the attorney is hired by the state as a "part-time consultant," Bounds v. Smith, 430 U.S. at 831, or retained by the inmate personally. Indeed, inmate access to "some sort of direct legal assistance," Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985), is usually "much more effective," Williams v. Leeke, 584 F.2d at 1340, than access to a law library.

Petitioner enjoyed "direct legal assistance" to help him prepare and

pursue his claims before the courts and had "reasonable opportunity to seek and receive the assistance of an attorney." Petitioner discussed his claims with his criminal defense attorney and with his civil rights attorney. The civil rights attorney decided against challenging Summit County's jail conditions but assisted the Petitioner by providing him with the necessary pre-printed pro se civil rights complaints, providing instruction on how to prepare the complaints, and offering to aid petitioner in locating another civil rights attorney. Petitioner declined the opportunity to find a substitute counsel, and did not file a pro se complaint, but nevertheless had an "adequate opportunity" to present his claims.

Respondents did not impede Petitioner's protected right to prepare a

complaint against them. Petitioner was allowed the necessary freedom to communicate with his civil rights attorney and to obtain the prepared pro se complaint forms and instructions. Likewise, respondents did not block or prevent any attempt by Petitioner to communicate with the courts. The record is void of any reference to Petitioner's inability to file petitions, correspond with counsel or the court, receive the assistance of fellow inmates, have access to the means for communicating his concerns through the provision of pen, stationery, envelopes, stamps, and notarial services. Respondent did not prevent Petitioner from filing any pleadings with the court and pleadings were not returned to Petitioner by the court for failure to comply with appropriate format or procedural rules. While the Petitioner nevertheless argues

that his right to reasonable access to the court was denied it seems clear that "the simple invocation of [this phrase] will not carry the day for [the] plaintiff. . . ." Gilmore v. Lynch, 319 F. Supp. 105, 109 (1970), aff'd sub nom., Younger v. Gilmore, 404 U.S. 15 (1971). Petitioner consulted with an attorney, obtained proper forms and instructions and was "not denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, 418 U.S. 539, 579 (1974). Hence, Petitioner's right of access claim is moot. Petitioner had the unrestrained opportunity to pursue any potential cause of action against Summit County. He chose not to bring any action and concedes that any potential claims against the County were not prejudiced by his failure to initiate

suit during the seven months he was incarcerated.

Petitioner was accorded "meaningful access" to the courts. Where that measure is satisfied, the constitutional inquiry ends.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 10th day of July, 1986.

SNOW, CHRISTENSEN & MARTINEAU

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